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LOCAL CONTROL IN LOW-INCOME DEVELOPMENT: THE PROMISE OF CALIFORNIA'S ARTICLE 34

I. INTRODUCTION

Article 34 was added by initiative to the California Constitution in order to give local citizens a voice in the development of low-income housing in their communities.¹ In the forty years since its inception, article 34 and its mandated referenda have been limited in scope and effect by judicial decisions, Attorney General's advisory opinions, and legislative enactments. Have these governmental bodies restricted article 34 to such an extent that it no longer gives control to local voters? This comment addresses this issue.

Article 34 reads:

No low rent housing project shall hereafter be developed, constructed, or acquired in any manner by any state public body until, a majority of the qualified electors of the city, town or county, as the case may be, in which it is proposed to develop, construct, or acquire the same, voting upon such issue, approve such project by voting in favor thereof at an election to be held for that purpose, or at any general or special election.²

According to the argument supporting the initiative, a vote in favor of adding article 34 to the California Constitution was a vote for the right to say yes or no when a community was considering a low-income housing project.³ The need for community control was necessary because of tax waivers, and other forms of community assistance that a public housing project required.⁴

Although basic definitions are given within the statute, there remains a great deal of ambiguity.⁵ This ambiguity has centered pri-

1. CAL. CONST. art. XXXIV.

2. *Id.* § 1. The ballot argument in favor of the initiative reads: "Passage of the Public Housing Projects Law will restore to the citizens of a city, town, or county, as the case may be, the right to decide whether public housing is needed or wanted in each particular locality." *Davis v. City of Berkeley*, 794 P.2d 897, 901 n.5 (Cal. 1990).

3. *Davis*, 794 P.2d at 901 n.5.

4. *See id.* at 898.

5. *Id.*

marily around the words "low-rent housing project,"⁶ and "develop, construct, or acquire."⁷ It has been through the interpretation of these words that the statute has been defined and restricted.

The background of this comment discusses the relevant cases, codes and Attorney General's advisory opinions regarding the present scope of article 34.⁸ The analysis compares and contrasts the state's and the communities' interests involved in article 34 referenda.⁹ It defines where and in what circumstances an article 34 referendum is required, and then determines the actual scope of article 34 in light of the present low-income housing development in California. The analysis closes with the conclusion that article 34 gives little or no local-level citizen control over low-income housing development. The comment then concludes with a proposal for the establishment of a local-level Affordable Housing Board, which will broaden the citizens' voice in the development of the low-income housing in their communities.¹⁰

II. BACKGROUND

A. *Origin*

Article 34 of the California Constitution had its origin in 1950 in a controversy surrounding a low-income housing project which was planned in Eureka, California.¹¹ The local Housing Authority had applied to the federal government for money which was to be used to cover the cost of planning and surveys in connection with the development of low-income public housing.¹² The city entered into a cooperation agreement with the Housing Authority.¹³ Once the ap-

6. Article 34 defines a low-rent housing project as follows:

For the purposes of this article, the term "low-rent housing project" shall mean any development composed of urban or rural dwellings, apartments or other living accommodations for persons of low income, financed in whole or in part by the Federal Government or state public body or to which the Federal Government or a state public body extends assistance by supplying all or part of the labor, by guaranteeing the payment of liens, or otherwise.

CAL. CONST. art. XXXIV, § 1.

7. *Id.* This article does not define these terms.

8. *See infra* part II.

9. *See infra* part III.

10. *See infra* part IV.

11. *Davis v. City of Berkeley*, 794 P.2d 897, 898 (Cal. 1990). *See generally* ECONOMIC DEVELOPMENT AGENCY, STATE OF CALIFORNIA, CALIFORNIA STATISTICAL ABSTRACT 47 (1963) (presenting statistics showing that Eureka, a northern California city, had 7,367 inhabited dwellings, and a population of 23,058 in April of 1950).

12. *Davis*, 794 P.2d at 898.

13. *Id.*

plicable documents were filed with the federal government, the City Clerk was presented with a petition signed by more than fifteen percent of the electorate requesting that any city council approval of the Housing Authority's loan application be submitted to the electorate for a vote.¹⁴

The City Clerk refused to accept the petition, based on the city's position that the council was acting in its administrative capacity.¹⁵ In the resulting suit,¹⁶ the California Supreme Court, citing a previous holding in *Kleiber v. City and County of San Francisco*,¹⁷ stated that the actions of local governments under statewide housing laws are "administrative only for the purpose of giving statewide effect to legislative policy."¹⁸ The power of referendum applies only to legislative acts, not acts that are executive or administrative.¹⁹ Since the acts were administrative and not legislative, the people could not use a referendum to change the city government's decisions, and the court had no jurisdiction.²⁰ The city and the Housing Authority were therefore free from voter control in this instance.

Since the citizens of Eureka initially could not control the proposed project in their city, they joined with the California Board of Realtors and began a drive to put a measure on the ballot which required local citizen approval of low-income housing projects.²¹ By November of 1950, the ballot proposition presenting article 34 was put before the California electorate.²² The initiative measure was proposed to abrogate the decision in Eureka, and to require local entities to obtain voter approval before planning and building publicly-supported, low-income housing projects.²³ The purpose of the initiative was to allow "interested citizens"²⁴ the opportunity to

14. *Housing Auth. v. Superior Ct.*, 219 P.2d 457, 457 (Cal. 1950).

15. *Id.* at 463.

16. *Housing Authority*, 219 P.2d at 457.

17. *Kleiber v. City of San Francisco*, 117 P.2d 657 (Cal. 1935). In *Kleiber*, a San Francisco taxpayer sought an injunction against the city and housing authority to prevent performance of provisions of contracts. *Id.* at 657. The plaintiff based the case on the theory that the supervisors' acts of entering into the contracts were legislative in character and therefore the contractual provisions had to be enacted by ordinance. *Id.* at 659. The court held that the actions were administrative because they gave effect to declared legislative policy. *Id.* at 660.

18. *Housing Authority*, 219 P.2d at 462.

19. *Id.* at 460.

20. *Id.* at 461.

21. STATE OF CALIFORNIA DEPARTMENT OF HOUSING AND COMMUNITY DEVELOPMENT RESEARCH & POLICY DIVISION, ARTICLE 34: LEGAL ISSUES & BALLOT MEASURES 21 (1978) [hereinafter CDHCD 1978].

22. *Davis v. City of Berkeley*, 794 P.2d 897, 898 (Cal. 1990).

23. *Id.*

24. 66 Op. Att'y Gen. 205, 206 (1983) (Interested citizens are defined as "members of

weigh the cost of low-income projects against the needs for affordable housing in the community.²⁵

There were two major concerns cited by the proponents of article 34 that were presented to the voters in the election pamphlet.²⁶ The first issue was the drain on the community's finances as a result of the low-income housing.²⁷ This was due to the fact that these publicly financed developments were not subject to local property taxes.²⁸ Despite this, the community still paid for the improvements needed to support the development.²⁹

The second issue was the aesthetic cost to the community.³⁰ Low-income developments were typically high-density apartment complexes, housing only low-income tenants.³¹ Because the structures were built on limited funds, the architecture and craftsmanship were usually basic.³²

Throughout the cases and the Attorney General's advisory opinions, the reasons cited in the voter pamphlet were used to determine the intent of the supporters of the initiative.³³ However, it was the opinion of the California Department of Housing and Community Development (hereinafter CDHCD) that article 34 was designed to inhibit the development of public housing projects.³⁴

B. *Constitutionality*

In 1971, *James v. Valtierra* tested the constitutionality of article 34 on an equal protection basis.³⁵ After low-income housing proposals were defeated by referenda in San Jose and San Mateo County, a group of black and Mexican-American persons who were eligible for low-income housing in these communities filed suit in federal district court.³⁶ They alleged that article 34 violated the U.S. Constitu-

the particular community in which the project is to be established, not . . . the citizens of another community in another part of the same county.").

25. *Davis*, 794 P.2d at 899.

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

31. See CAL. HEALTH & SAFETY CODE § 37000 (West Supp. 1993).

32. *Id.*

33. *E.g.*, *Davis*, 794 P.2d at 899; 66 Op. Att'y Gen. 205, 206 (1983).

34. CDHCD 1978, *supra* note 21, at 1.

35. *James v. Valtierra*, 402 U.S. 137 (1971).

36. *Id.* at 139. The Housing Authorities in San Jose and San Mateo could not apply for federal funds for low-income housing development because the required article 34 referenda had been defeated. The plaintiffs, who were eligible for low-income housing, sought a declara-

tion's Supremacy Clause,³⁷ Privileges and Immunities Clause,³⁸ and Equal Protection Clause.³⁹ The district court struck down article 34, holding that article 34 violated the Equal Protection Clause.⁴⁰ This decision was overturned by the United States Supreme Court which found that article 34 did not rest on "distinctions based on race."⁴¹ The Court held that a referendum was required on any low-income project when the project was within the guidelines set forth in the article, not just projects which were to be occupied by racial minorities.⁴²

The appellees also argued that article 34 denied equal protection to low-income people who desired housing because they were singled out for a mandatory referendum which no other group must face.⁴³ The Court disagreed with this argument as well by pointing out that referenda are required in California in other situations.⁴⁴ The Court also noted that a referendum is a democratic decision-making procedure.⁴⁵ In fact, California has a long history of using the referendum process to influence or make public policy.⁴⁶

C. *Attempts to Repeal and Modify Article 34*⁴⁷

In 1974, the legislature approved a measure authored by As-

tion that article 34 was unconstitutional. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.* at 139-40.

41. *Id.* at 141.

42. *Id.*

43. *Id.* at 140.

44. *Id.*

45. *Id.* at 141-42.

46. *Id.* The Court noted that referenda are required for approval of state constitutional amendments, to issue general obligation long-term bonds by local governments, and for certain municipal land annexations or land sales. *Id.*

47. In August of 1992, the legislature passed a resolution proposing an amendment to article 34 that is scheduled to go before the public in June of 1994. *See* Bradley Inman, *Affordable Housing: NIMBYs to BANANAs*, S.F. CHRON., Sept. 27, 1992, at F5 (This article equates article 34 with "NIMBYism," and indicates that a coalition of social activists and real estate industry leaders have been the driving force behind this proposed amendment. NIMBY stands for "not in my back yard"). The amendment would completely change the provisions of the article. The new measure would instead require that a state public body give notice of a proposed development to an area that would incur a "significant negative impact" as a result of the expenditure of city or county revenues, or as a result of the effects of the development on the physical appearance of the surrounding community. 1992 Cal. Legis. Serv. A1 (West). Voters who object would be required to sign a petition in order to put the project before the public. *Id.* The petition process would follow the same procedures as the qualification of any local referendum. The measure would authorize the project if a majority of the voters do not

semblyperson Willie Brown⁴⁸ that placed the repeal of article 34 before the voters in Proposition 15.⁴⁹ The proposition was defeated.⁵⁰ In the 1978 edition of "Article 24: Legal Issues and Ballot Measures," the CDHCD attributed the loss to two issues.⁵¹ First, the repeal measure would have completely removed the right of popular control over all low-income housing projects.⁵² Second, the campaign in favor of the measure suffered from low visibility.⁵³

As a result of the housing crisis and the upturn in the success of article 34 referenda after 1974, Assemblyperson Brown authored a modification of article 34 in 1977.⁵⁴ This came before the electorate as Proposition 4 in 1980, but was defeated.⁵⁵ The proposition would have shifted the referendum burden from advocates of low-income housing to its opponents.⁵⁶ It provided that proposed housing developments would be subject to referendum only if a petition objecting to the development was submitted to the county or city clerk within sixty days of public notice of the proposed development.⁵⁷

D. *Types of Housing Which Require an Article 34 Referendum*

Since article 34's inception, there has been confusion as to what type of low-income project falls within the parameters which require a referendum. There have been four relevant appellate court decisions, two California Supreme Court decisions, and numerous Attorney General's advisory opinions which have dealt with this issue.⁵⁸

reject the proposal, or if there is no election. *Id.*

In addition, the proposed amendment redefines the term "low rent housing project" to be 16 or more housing units in a rural area, or 24 or more units in an urban area. *Id.* To be included under article 34, these projects must be owned by a state public body, receive an ad valorem property tax exemption that is not substantially reimbursed, and be financed in whole, or in part, by the federal government. *Id.* Excluded from the definition is any project whose operation does not have a significant negative impact on the city or county revenues, and whose physical appearance does not have a significant negative impact on the surrounding community. *Id.* at A2.

48. Willie Brown is the California Democratic Assemblyperson from the 17th District, which includes Oakland and San Francisco. CDHCD 1978, *supra* note 21, at 28.

49. *Id.* at 3.

50. See CDHCD 1978, *supra* note 21, at 3.

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

55. STATE OF CALIFORNIA DEPARTMENT OF HOUSING AND COMMUNITY DEVELOPMENT, ARTICLE 34: LEGAL ISSUES & BALLOT MEASURES 1 (1980) [hereinafter CDHCD 1980].

56. *Id.*

57. *Id.*

58. CDHCD 1978, *supra* note 21, at 2-5.

In addition, the legislature enacted the Public Housing Election Implementation Law in 1976 in order to clarify the ambiguities.⁵⁹

1. *California Court of Appeal Cases*

The First District Court of Appeal has heard four cases on whether an article 34 referendum is required before low-income housing can be constructed. In each case, the court examined a situation in which the government, either through agency involvement or through government funding, became marginally involved in the development of low-income housing. In each case, the court held that an article 34 referendum was not necessary.

In *Winkelman v. City of Tiburon*,⁶⁰ the court held that where a private developer rather than a public body constructed units in which thirty percent would be set aside for low-income residents, there was not sufficient public agency involvement to constitute "develop[ment], construct[ion] or acqui[sition]" by a public entity.⁶¹ The key here was that the project, although partially funded with public money, was in fact being built by a private party.⁶² The project was not tax exempt, and therefore the community was not deprived of additional tax revenues. The court found that reserving thirty percent of the total units for low-income occupation did not constitute a low-income housing project.⁶³ However, the court did say in addition that there could be a situation in which there was unusual government involvement in a private development which would trigger article 34.⁶⁴

The court addressed the issue of whether an article 34 referendum was required when property improvements were funded by government-funded rehabilitation loans in *Board of Supervisors v. Dolan*.⁶⁵ In *Dolan*, the court held that low-interest loans to property

59. See discussion *infra* notes 91-115.

60. *Winkelman v. City of Tiburon*, 108 Cal. Rptr. 415 (Ct. App. 1978). In *Winkelman*, the plaintiffs were attempting to prohibit the construction of a low-income housing project on a site adjacent to their property by suing the city to set aside the zoning ordinance which permitted the project, to prohibit the sale of the property by the Housing Authority to a non-profit developer, and to postpone all action pending the outcome of a referendum pursuant to article 34. *Id.* at 419.

61. *Id.* at 418.

62. *Id.*

63. *Id.* at 422.

64. *Id.*

65. *Board of Supervisors v. Dolan*, 119 Cal. Rptr. 347 (Ct. App. 1975). The *Dolan* court upheld the constitutionality of the Marks-Foran Residential Rehabilitation Act of 1973, which authorized cities, counties, redevelopment agencies, and housing authorities to make long-term, low-interest loans to finance residential rehabilitation in depressed residential areas.

owners which were to be used for structural rehabilitation were not public monies being used to develop or construct low-income housing.⁶⁶ The loans were made directly to property owners.⁶⁷ There was no income test which determined the eligibility to reside in the units.⁶⁸ Therefore, this was not a case where article 34 was involved.⁶⁹

In *Redevelopment Agency v. Shepard*, the court found that the involvement of the local agency which controlled the development of the project was sufficient to bring it within the parameters of article 34.⁷⁰ However, since there was no requirement that only persons of low-income live in the development, article 34 voter approval was not necessary.⁷¹

In 1981, the court in *Conway v. City of San Mateo*,⁷² applied California Health and Safety Code section 37000 and found that there was no requirement for a referendum under article 34. The project being built was not low-income as defined in Health and Safety Code section 37001.⁷³ In fact, the development fell under the criteria in the code for housing which was not subject to article 34: It was privately owned, it was not exempt from ad valorem taxation by reason of public ownership, and the project was to be financed by a private loan with a government guarantee, rather than with a direct government subsidy.⁷⁴

2. California Supreme Court Cases and California Codes

In the late 1970s, both the California Supreme Court and the California Legislature narrowed the scope of article 34 by restricting the types of housing developments that required a referendum.⁷⁵ By the end of that decade, article 34 applied only to conventional

Id. at 355; see CAL. HEALTH & SAFETY CODE § 37910 (West 1973) (repealed 1980).

66. *Dolan*, 119 Cal. Rptr. at 354-55.

67. *Id.*

68. *Id.* at 355.

69. *Id.*

70. *Redevelopment Agency v. Shepard*, 142 Cal. Rptr. 212 (Ct. App. 1977). *Shepard* involved the reviewing of redevelopment agency activities under the Redevelopment Construction Loans Act. *Id.*

71. *Id.* at 217.

72. *Conway v. City of San Mateo*, 179 Cal. Rptr. 561 (Ct. App. 1981). The plaintiff, a city resident, sought a writ of mandate to compel city officials to submit a proposed housing project on city-owned land for approval under article 34. *Id.* at 562-63.

73. *Id.* at 564.

74. *Id.* at 564-65.

75. See *infra* part II.D.2.

low-income projects.⁷⁶

The California Supreme Court heard *California Housing Finance Agency v. Elliot*⁷⁷ in 1976. This case was decided by the court not long after the voters refused to repeal article 34.⁷⁸ The court stated that the purpose underlying article 34 was "to permit the people of a community to have a voice in decisions which affect the development of their community and which could substantially increase their tax burden."⁷⁹ It viewed the rejection of the ballot proposal for repeal of the article as a renewed commitment by the people to the purposes of article 34.⁸⁰ The court stated that it "cannot ignore such a recent expression of the public will."⁸¹

Elliot involved low-income housing which was being financed through the California Housing Finance Agency (hereinafter HFA) under Health and Safety Code section 41000.⁸² This section authorizes the HFA to issue bonds and make the proceeds available for the construction of low-rent and mixed housing projects.⁸³

The projects financed by these bonds were to be constructed by private sponsors.⁸⁴ The agency retained extensive control in planning, rent setting, inspecting, and tenant selection.⁸⁵ The agency also limited the profits of the sponsors, prescribed grievance procedures between tenants and sponsors, and established maximum sale prices for the housing developments.⁸⁶ The court found that this extensive supervision was not merely an aspect of the HFA's financing function,⁸⁷ but was also a means of insuring that public policy and the

76. See *California Hous. Fin. Agency v. Patitucci*, 583 P.2d 729 (Cal. 1978).

77. *California Hous. Fin. Agency v. Elliot*, 551 P.2d 1193 (Cal. 1976).

78. *Id.* at 1203.

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.* at 1196. This section of the Health and Safety Code codified the Zenovich-Moscone-Chacon Housing and Home Finance Act. *Id.* at 1195. "The primary purpose of the act is to meet the housing needs of persons of low or moderate income." *Id.* at 1196.

83. CAL. HEALTH & SAFETY CODE § 41000 (West 1986) (repealed 1977); see also *Elliot*, 551 P.2d at 1196, 1197-98, 1205. In *Elliot*, the agency chairperson asserted that the projects financed by these bonds fell under the parameters of article 34. *Id.* at 1193. The agency sought a writ of mandate in the California Supreme Court to compel the chairperson to print and issue the bonds. *Id.* at 1197. The court upheld the constitutionality of § 41000, and found that the housing being constructed did qualify for voter approval under article 34. *Id.* at 1204-15. The court did not compel the agency to issue the bonds in question, but left it free to proceed with bond issuance in light of the opinion. *Id.* at 1197.

84. *Elliot*, 551 P.2d at 1196. "Housing sponsors" were defined as various types of private developers and local public entities. *Id.*

85. *Id.*

86. *Id.* at 1201.

87. *Id.* at 1205.

purpose of the program would be achieved.⁸⁸ As a result of the extensive participation by the HFA, the court held that an article 34 referendum was required.⁸⁹ The court also found that when seventy-five percent of the tenants were low-income, the project qualified as a low-income project for article 34 purposes.⁹⁰

Elliot clarified that significant involvement of the state or local public entity satisfied the requirements of article 34; however, it was not clear at what point the involvement of a public entity would be considered "significant." As a result of the confusion, the legislature enacted the Public Housing Election Implementation Law.⁹¹ This law defines "low-rent housing project" and outlines projects which are not low-rent projects for the purposes of article 34.⁹²

The legislature limited article 34 in California Health and Safety Code section 37000 to conventional public housing projects.⁹³ By interpreting the intent of the electorate at the time that article 34 was passed, the legislature determined that article 34 should apply only to those types of low-income housing projects that would have been built in 1950.⁹⁴ The projects of the 1950s were different than housing provided by private developers today in architecture, design, location standards, and the level of amenities provided.⁹⁵ In addition, the low-rent projects of the 1950s were inhabited entirely by persons of low income, and they were usually exempted from ad valorem property taxes.⁹⁶

88. *Id.*

89. *Id.*

90. *Id.* at 1204.

91. CAL. HEALTH & SAFETY CODE § 37000 (West Supp. 1993).

92. *Id.* § 37001 (amended 1992).

The term "low-rent housing project" as defined in Section 1 of [article 34] of the [State] Constitution, does not apply to any development composed of urban or rural dwellings, apartments, or other living accommodations, which meets any one of the following criteria: (a)(1) The development is privately owned housing, receiving no ad valorem property tax exemption . . . not fully reimbursed to all taxing entities; and (2) not more than 49 percent of the dwellings, apartments, or other living accommodations of such development may be occupied by persons of low income; . . . (b) The development is privately owned housing, is not exempt from ad valorem taxation by reason of any public ownership, and is not financed with direct long-term financing from a public body; (c) The development is intended for owner-occupancy, which may include a limited equity housing cooperative . . . or cooperative or condominium ownership, rather than for rental occupancy

Id.

93. *Id.* § 37000.

94. *See id.*

95. *Id.*

96. *Id.*

In contrast to conventional public housing, developments built under Health and Safety Code section 37000 provide housing for low-income persons in a manner "consistent with and supportive of optimum community improvement."⁹⁷ In these projects, a percentage of the units is reserved for low-income occupancy with the balance going to persons with different income levels.⁹⁸ This type of project, known as a mixed-income development, is similar in design to a multi-unit market rate project.⁹⁹ In addition, these projects may be subject to ad valorem property tax.¹⁰⁰

The California Supreme Court analyzed Health and Safety Code sections 37000-02 in light of *Elliot* in *California Housing Finance Agency v. Patitucci*.¹⁰¹ Here again, as in *Elliot*, the HFA brought the suit in order to compel the agency president to issue bonds for housing construction.¹⁰² The project in *Patitucci*, however, was a mixed income complex as defined in the Health and Safety Code.¹⁰³ It was privately owned, carried no ad valorem property tax exemption, and no more than forty-one percent of the units were available to low-income occupants.¹⁰⁴ The court held that a project which met the parameters of this code section would not qualify as a low-income housing project for article 34 purposes.¹⁰⁵

In *Patitucci*, the court limited *Elliot* to the particular facts of that case.¹⁰⁶ It noted that there could be other results in cases in which the percentage of units available to low-income tenants dif-

97. *Id.*

98. *California Hous. Fin. Agency v. Patitucci*, 583 P.2d 729, 734 (Cal. 1978). There must be no more than 49% occupancy by people of low-income. CAL. HEALTH & SAFETY CODE § 37001 (West Supp. 1993). The court noted that the 49% occupancy represents a good faith effort by the legislature to integrate low-income tenants into the community. *Patitucci*, 583 P.2d at 734. See also *California Hous. Fin. Agency v. Elliot*, 551 P.2d 1193, 1204 (Cal. 1976). In contrast although the housing projects analyzed under *Elliot* were considered mixed-income, the court viewed them as low-income in effect because 75% of the tenants were low-income. *Elliot*, 551 P.2d at 1204.

99. CAL. HEALTH & SAFETY CODE § 37000 (West Supp. 1993).

100. Ad valorem is a type of tax which is levied in proportion to the value of the thing being taxed. BLACK'S LAW DICTIONARY 51 (6th ed. 1990). In this case, it refers to property taxes paid to the local government the amounts of which are based on the value of the real estate. See CAL. HEALTH & SAFETY CODE § 37000 (West Supp. 1993).

101. *Patitucci*, 583 P.2d at 729.

102. *Id.* at 730. Although the court found that the projects did not fall under article 34 parameters, it did not issue the writ of mandate to compel issuance of the bonds, because it assumed that the agency president would voluntarily comply with the agency's direction to issue and sell the bonds. *Id.* at 734.

103. *Id.* at 733; CAL. HEALTH & SAFETY CODE § 37001(a)(1) (West Supp. 1993).

104. *Patitucci*, 583 P.2d at 731.

105. *Id.* at 734.

106. *Id.* at 732.

ferred from that in *Elliot*.¹⁰⁷ It distinguished *Elliot* on the basis of the percentage of low-income units available in the project.¹⁰⁸ Seventy-five percent of the housing units in *Elliot* were low-income, and as a result, the court viewed the *Elliot* project as a low-income project "in effect."¹⁰⁹ The fact that twenty-five percent of the units were for moderate income tenants did not substantially change the characteristics of the project or its impact on the community.¹¹⁰ In *Patitucci*, on the other hand, the court recognized that a more truly mixed-income project could be seen as a partial solution to economic and racial isolation of purely low-income projects.¹¹¹ The court stated that the potential economic impact on the affected community is the primary test to be applied when deciding whether or not a project is, in effect, low-income.¹¹²

In *Patitucci*, the court reviewed Health and Safety Code section 37000 in light of article 34 and upheld the legislature's interpretation and analysis of article 34.¹¹³ The court noted that constitutional limitations on legislative power should be narrowly construed.¹¹⁴ Although article 34 was a direct expression of the will of the people, the legislature's interpretation should be upheld unless it is unreasonable, or clearly inconsistent with the express language or clear import of the Constitution.¹¹⁵

3. Attorney General's Advisory Opinions

There have been numerous Attorney General's advisory opinions addressing issues related to article 34 which have incorporated the courts' holdings and rationales. Article 34 referenda are not needed, according to the Attorney General, when housing is built by private sponsors,¹¹⁶ when previous permanent low rent units are being rehabilitated or replaced,¹¹⁷ or when units are meant for even-

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.* at 734.

111. *Id.*

112. *See id.* at 732.

113. *Id.* at 734.

114. *Id.*

115. *Id.*

116. 54 Op. Att'y Gen. 168 (1971) (article 34 does not apply unless there is some unusual state involvement).

117. 53 Op. Att'y Gen. 120 (1970) (razing and reconstructing approximately the same number of public housing units on the same site does not require article 34 approval because the referendum requirement refers only to initial bringing into being of a low-rent project).

tual tenant ownership either through a lease-purchase plan,¹¹⁸ or through cooperative ownership.¹¹⁹

The Attorney General did find three situations in which a vote under article 34 was necessary. The first was where a "typical low-rent project"¹²⁰ would be developed in order to relocate low-income persons displaced by a public project.¹²¹ The second was the construction of a farm labor center by a Housing Authority.¹²² The Attorney General viewed the farm labor center, used to house low-income farm workers, as a low-income project in effect.¹²³ The third situation where a vote would be required was one in which temporary low-income housing would be replaced by permanent low-income housing, either at the same or scattered sites.¹²⁴

E. Municipal Level Attempt to Control Low-Income Housing Development.

There has been one appellate level attempt to gain local control of low-income housing development. *Bruce v. City of Alameda* did not concern article 34, but rather an ordinance in Alameda which was adopted by initiative.¹²⁵ The ordinance, which was held invalid, provided that no government-subsidized rental housing could be built in Alameda for five years without voter approval.¹²⁶ The court found that the ordinance was in direct conflict with California Government Code section 65008 which states that no city shall enact an ordinance which prohibits or discriminates against low or moderate income res-

118. 52 Op. Att'y Gen. 133 (1969) (lease-purchase agreement program does not trigger article 34 because it is not the creation of a permanent resource of public housing accommodations).

119. 59 Op. Att'y Gen. 211, 214 (1976) (referendum approval is not necessary for cooperative ownership developments since they are not rental units).

120. 51 Op. Att'y Gen. 245, 246 (1968).

121. *Id.* at 248 (Providing replacement housing through leases would not trigger an article 24 referendum. Examples include lease contracts with private owners of housing, contracts with private developers of privately owned projects for short term lease or lease-purchase, and leasing of housing in existing public housing projects.).

122. 55 Op. Att'y Gen. 13 (1972) (farm labor center constructed by the Housing Authority falls under the parameters of article 34 by virtue of the tenant's income or the federal funding restrictions).

123. *Id.*

124. 56 Op. Att'y Gen. 480, 483-84 (1973) (new permanent units constitute projects with new social and economic impact, therefore an article 34 referendum is necessary).

125. *Bruce v. City of Alameda*, 212 Cal. Rptr. 304 (Ct. App. 1985).

126. *Id.* at 305-06. The ordinance, known as Measure I, stated: "[F]or a period of five years no more government subsidized rental housing shall be developed in the City of Alameda, unless development of such rental units is first approved by a majority of the voters in the City of Alameda." *Id.*

idential development.¹²⁷

The court reasoned that housing is a statewide concern, and therefore the citizens of Alameda did not have the right to forbid, in effect, the building of low-income housing in their city.¹²⁸ The court, quoting the legislature in Health and Safety Code section 33250 and Government Code section 65580, noted that the state's inadequate supply of affordable housing is contrary to the public interest, and that attainment of suitable housing for every California family requires the cooperation of all levels of government.¹²⁹ Based on this legislative intent, the court reasoned that housing was a matter of vital state concern.¹³⁰ The state law therefore preempted the Alameda ordinance, since the city by its charter could only legislate municipal affairs.¹³¹

F. *Ballot Requirements*

Prior to 1987, the cases clarifying the parameters of article 34 defined the types of housing and funding that trigger an article 34 referendum.¹³² Then, in the early 1980s, a controversy arose surrounding the wording of the ballot measure which gives article 34 approval to a proposed low-income project.¹³³ The use of a general blanket ballot authorization approving the construction of low-income housing units was ultimately upheld by the California Supreme Court in *Davis v. City of Berkeley*.¹³⁴

In 1977 and 1981, the voters in Berkeley authorized the construction of five hundred low-income housing units.¹³⁵ The authorizations were general, not site-specific.¹³⁶ In 1984, the city began construction of a seventy-five unit project.¹³⁷ When the city would not put the project before the voters, neighbors of the proposed site peti-

127. *Id.* at 305. California Government Code § 65008(c) reads: "No city . . . shall, in the enactment or administration of ordinances pursuant to this title, prohibit or discriminate against a residential development because such development is intended for occupancy by persons and families of low and moderate income." CAL. GOV'T CODE § 65008 (West Supp. 1993).

128. *Bruce*, 212 Cal. Rptr. at 306.

129. *Id.*

130. *Id.*

131. *Id.*

132. *See supra* part II.D.1-2.

133. *Davis v. City of Berkeley*, 238 Cal. Rptr. 730 (Ct. App. 1987), *aff'd*, 765 P.2d 46 (Cal. 1988), *aff'd on reh'g on other grounds*, 794 P.2d 879 (Cal. 1990).

134. *Davis v. City of Berkeley*, 794 P.2d 897 (Cal. 1990).

135. *Davis*, 238 Cal. Rptr. at 732.

136. *Id.*

137. *Id.*

tioned for a writ of mandate claiming that the project had not been authorized under article 34.¹³⁸ The Superior Court of Alameda County denied the petition in *Davis v. City of Berkeley*.¹³⁹ It was appealed to the First District Court of Appeal which found in favor of the city.¹⁴⁰

Davis argued that, because the general authorization for the construction of low-income units contained no information regarding any specific housing project, the ballot measure failed to authorize the construction for article 34 purposes.¹⁴¹ Berkeley maintained that article 34 requires only general voter approval, and that authorization may be necessary for a specific number of low-income units, but not for a specific project.¹⁴²

The court put great emphasis on the state's interest in supplying safe and sanitary dwellings for persons and families of low income.¹⁴³ It viewed the appellant's arguments as restrictions on the government's ability to implement the "expeditious construction of such housing."¹⁴⁴ The court found the language of article 34 to be ambiguous,¹⁴⁵ and it relied on cases which analyzed similar terms and statutes to define the meaning of the words "development" and "project."¹⁴⁶ It noted that in *Blodget v. Housing Authority*,¹⁴⁷ federal housing legislation was used to define the term "development" to include all undertakings necessary for planning, land acquisition, or construction of a low-rent housing project.¹⁴⁸ The court also cited *Housing Authority v. Shoecraft*¹⁴⁹ and *Drake v. City of Los Angeles*¹⁵⁰ which analyzed Health and Safety Code section 34313.¹⁵¹ This code section pre-dated article 34, and its language is similar in many respects.¹⁵² In these cases, the California Supreme Court interpreted

138. *Id.*

139. *Id.* at 733.

140. *Id.* at 730.

141. *Id.* at 734.

142. *Id.* at 736.

143. *Davis*, 238 Cal. Rptr. at 733.

144. *Id.*

145. *Id.* at 734.

146. *Id.* at 734-35.

147. *Blodget v. Housing Auth.*, 243 P.2d 897 (Cal. 1952). In *Blodget*, the court rejected the argument that the term "low-rent housing project" must represent existing buildings. *Id.* at 901.

148. *Davis*, 238 Cal. Rptr. at 734.

149. *Housing Auth. v. Shoecraft*, 254 P.2d 628 (Cal. 1953).

150. *Drake v. City of Los Angeles*, 243 P.2d 525 (Cal. 1952).

151. CAL. HEALTH & SAFETY CODE § 34313 (West 1973).

152. *Davis*, 238 Cal. Rptr. at 734. California Health and Safety Code § 34313 states: "[N]o low-rent housing . . . project shall be developed, constructed, or owned . . . until the

section 34313 as not requiring voter approval of specific details of a proposed low-income project.¹⁵³ Based on this analysis, the appellate court in *Davis* concluded that article 34 language contained no requirement of specificity for a low-income housing proposal.¹⁵⁴

The court next attempted to determine the purpose of article 34 by examining its historical context and the ballot arguments in favor of its adoption.¹⁵⁵ It reviewed the controversy in Eureka that ultimately led to article 34 and noted that *Housing Authority v. Superior Court*¹⁵⁶ was initiated in response to Eureka's filing of a preliminary loan application that contained no details as to project identification.¹⁵⁷ The court concluded that since project details were not available to the citizens of Eureka, similar details were not necessary for article 34 approval.¹⁵⁸

Finally the court, quoting the argument supporting the adoption of article 34 in the 1950 voter's pamphlet, compared public housing to revenue bonds in that both commit the public to many years of debt.¹⁵⁹ Bond propositions are submitted to the voters in broad and general terms, and the details of particular projects are not required.¹⁶⁰ The court, in applying the analogy, found that the article 34 ballot proposition should be similarly general.¹⁶¹ Based on this analysis, the court of appeal held that the general voter authorization in Berkeley was adequate for article 34 approval, thus the seventy-five unit housing project was validly authorized.¹⁶²

In December of 1988, the California Supreme Court affirmed the judgment of the court of appeal but stated that it would not issue the writ of mandate because the housing project in Berkeley was virtually complete.¹⁶³ However, the court did not agree with the court of appeal that an open-ended general authorization was sufficient for article 34 approval.¹⁶⁴ The supreme court concluded that

governing body of the county or city in which it is proposed to develop, construct or own the project, approves it by resolution." CAL. HEALTH & SAFETY CODE § 34313 (West 1973).

153. *Davis*, 238 Cal. Rptr. at 734-35.

154. *Id.* at 735.

155. *Id.*

156. *Housing Auth. v. Superior Ct.*, 219 P.2d 457 (Cal. 1950).

157. *Davis*, 238 Cal. Rptr. at 736.

158. *Id.*

159. *Id.* at 737-38.

160. *Id.* at 738.

161. *Id.*

162. *Id.* at 740.

163. *Davis v. City of Berkeley*, 765 P.2d 46, 47 (Cal. 1988), *aff'd on reh'g on other grounds*, 794 P.2d 897 (Cal. 1990).

164. *Id.* at 48.

the relationship between the undifferentiated block of units approved by the voters, and the subsequently developed seventy-five unit project was so attenuated that the required authorization under article 34 was effectively empty of all significance.¹⁶⁵ The court went on to explain that a proposed project must be identified to voters at least in limited terms in order to give the constitutional language meaning and effect.¹⁶⁶

The court found that the language of article 34 is unambiguous,¹⁶⁷ and that the words should be given their ordinary and common meaning.¹⁶⁸ The word of greatest significance to the court's analysis was "project."¹⁶⁹ The court acknowledged that definitions of "project" range from a specific plan or design, to a group of houses or apartment buildings.¹⁷⁰ Assuming that the voters in 1950 intended the word to be used in its least concrete sense, that is, a proposed plan or design, the court found it impossible to conclude that Berkeley submitted such a "project" to its voters for authorization.¹⁷¹ An endorsement of Berkeley's on-going authority to support and build low-income housing was not synonymous with an endorsement of any proposed plan.¹⁷² It was the opinion of the court that the constitution required authorization of a proposed plan.¹⁷³

The court supported this interpretation by then analyzing the term "development."¹⁷⁴ It noted that this word in the article itself is modified by the phrase "composed of urban or rural dwellings."¹⁷⁵ The court interpreted this as referring to a result or a plan, as opposed to a planning process.¹⁷⁶ As a result, the court found that article 34 requires a voter approval of specific housing projects rather than approval of the prospective authority of a city to build public housing.¹⁷⁷

The court then reviewed the authorities which the court of appeal had relied upon to support its analysis and holding. The supreme court first noted that the *Blodgett* opinion did not suggest that

165. *Id.*

166. *Id.*

167. *Id.* at 49-50.

168. *Id.* at 47-51.

169. *See id.* at 50.

170. *Id.*

171. *Id.*

172. *Id.* at 50-51.

173. *Id.* at 52.

174. *Id.* at 51.

175. *Id.*

176. *Id.*

177. *Id.*

a housing project existed within the meaning of article 34, when a city had done nothing but select the total number of units it wished to build in the future.¹⁷⁸ The court continued, stating that the planning of buildings referred to the development of projects that were already articulated proposals, and that planning cannot occur in connection with a project that has not been conceived.¹⁷⁹ Activities preceding conception of a housing project constitute the planning of a housing policy.¹⁸⁰

The court reviewed the facts of *Drake*,¹⁸¹ and noted that two days after the approval of the project by the Los Angeles City Council, the preliminary funding application was submitted to the federal government.¹⁸² Although the council did not consider detailed specifications of the project, it did review and approve an articulated proposal, rather than a plan for long-range development of low-income housing.¹⁸³

Finally, the court distinguished Health and Safety Code section 34313 from article 34 on the basis of the intent of the framers of each provision. Section 34313 is part of broad federal housing legislation that facilitates the development of public housing.¹⁸⁴ The court presumed that the intent of the voters who adopted article 34 was to check the development of public housing and, therefore, the court's interpretation of terms in *Drake* cannot control the interpretation of words and phrases in article 34.¹⁸⁵

The court then analyzed the historical context of article 34 and noted that the voters in Eureka sought to review a preliminary loan application that was to cover the cost of surveys and planning in connection with a proposed housing project.¹⁸⁶ If article 34 was intended to give voters the rights denied those citizens in Eureka, then the housing projects authorized under an article 34 vote should be specified at a level of detail similar to the proposal challenged in Eureka.¹⁸⁷ On this basis, the court found that the authorization

178. *Id.* at 53.

179. *Id.*

180. *Id.*

181. *Drake v. City of Los Angeles*, 243 P.2d 525 (Cal. 1952).

182. *Davis*, 765 P.2d at 54.

183. *Id.*

184. *Id.* at 55.

185. *Id.*

186. *Id.* at 56.

187. *Id.* The 1950 Ballot Argument for Proposition 10, which was enacted as article 34, stated that a vote in favor of the amendment was a "vote for the future right to say yes or no when the community considers a public housing project." *Davis v. City of Berkeley*, 238 Cal. Rptr. 730, 733 (Ct. App. 1987), *aff'd*, 765 P.2d 46 (Cal. 1988), *aff'd on reh'g on other*

presented to voters should be in the terms required for the purposes of preliminary funding requests.¹⁸⁸ Specifically, the court concluded that the ballot measure should include the size, household-type, and structure-type of the project, and the community in which it will be developed.¹⁸⁹ It should also include whether sites with appropriate and adequate facilities and services are available.¹⁹⁰

In March of 1989, rehearing was granted, and in August of 1990, *Davis v. City of Berkeley* was affirmed.¹⁹¹ However, the court, on rehearing, returned to the conclusions of the court of appeal.¹⁹² The court this time viewed the word "project" as somewhat ambiguous.¹⁹³ It redefined the terms "project" and "development" so that they indicate a housing project which is in the first stages of development.¹⁹⁴ It noted that when the citizens of Eureka first requested the vote on the low-income project in 1950, the project was still in its initial stages.¹⁹⁵ The Eureka proposal identified the number of low-rent housing units for which planning funds were sought, but did not designate a specific site for the units, the size of the units, the value of the property, the time span in which the units were to be

grounds, 794 P.2d 879 (Cal. 1990). The ballot argued further:

Time after time in the past year, California communities have had public housing projects forced upon them without regard either to the wishes of the citizens or community needs. This is a particularly critical matter in view of the fact that the long-term multimillion-dollar public housing contracts call for tax waivers and other forms of local assistance, which the Federal Government says will amount to half the cost of the federal subsidy on the project as long as it exists. For government to coerce such additional hidden expenses on the voters at a time when taxation and the cost of living have reached an extreme high is a "gift" of debatable value. It should be accepted or rejected by ballot.

California Hous. Fin. Agency v. Patitucci, 583 P.2d 729, 734 (Cal. 1978). The voter pamphlet also drew similarities between the financing of public housing and revenue bonds:

[T]he financing of public housing projects is an adaptation of the principle of the issuance of revenue bonds. Under California law, revenue bonds, which bind a community to many years of debt, cannot be issued without local approval given by ballot. Public housing and its long years of hidden debt should also be submitted to the voters to give them the right to decide whether the need for public housing is worth the cost.

Davis, 238 Cal. Rptr. at 738 (quoting Ballot Pamp., Proposed Amends. to Cal. Const. with arguments to voters, Gen. Elec. (Nov. 7, 1950)). Newspaper and campaign literature concerning Proposition 10 emphasized the effect of public housing on the community's tax rolls and aesthetic values. *Patitucci*, 583 P.2d at 734.

188. *Id.*

189. *Id.* at 57.

190. *Id.* at 58.

191. *Davis v. City of Berkeley*, 794 P.2d 897 (Cal. 1990).

192. *See id.*

193. *See id.* at 898.

194. *Id.* at 899.

195. *Id.*

built, or any other detail.¹⁹⁶ Therefore, the Eureka project was no more specific than a general authorization such as the one used by the City of Berkeley.¹⁹⁷

In addition, the court noted that the article reads that a project should not be "developed . . . in any manner" until the authorization is given by the voters.¹⁹⁸ The court interpreted this to mean that the voters in 1950 intended the election to occur at a relatively early stage, before substantial planning had been completed.¹⁹⁹ Therefore, this "plain language" is not inconsistent with the use of a non-specific ballot measure.²⁰⁰

After analyzing article 34's wording and historical context, the court listed other governmental bodies which support the use of the non-specific ballot measure.²⁰¹ The CDHCD consistently interpreted article 34 as authorizing an open-ended, general ballot measure.²⁰² The California Attorney General confirmed the validity of this form of ballot measure in a formal advisory opinion.²⁰³ The legislature demonstrated its support of the early non-specific ballot measure through Health and Safety Code sections 36000-05 which authorize and set a time-limit for bringing a validation action.²⁰⁴

The court also gave great deference to the fact that communities have been using general ballot measures, which contain no specific information aside from the number of units, since the inception of article 34.²⁰⁵ It recognized that public confidence in government could be undermined if practices uniformly followed by public entities over many years were declared unconstitutional.²⁰⁶ The court discussed a number of entities which recognized the non-specific ballot measure: The Counties of Yolo and Los Angeles, the CDHCD, the California Attorney General, and the California Legislature.²⁰⁷ The court did not find the plaintiff's arguments of sufficient force to cause a change in this forty-year history of consistent

196. *Id.* at 898.

197. *Id.* at 902.

198. *Id.* at 898.

199. *Id.* at 901.

200. *Id.*

201. *Id.* at 905 & n.7.

202. *Id.* at 905.

203. *Id.* at 906-06; 66 Op. Att'y Gen. 205, 209-10 (1983); 59 Op. Att'y Gen. 211, 212-13 (1976).

204. *Davis*, 794 P.2d at 906.

205. *Id.* at 905 & n.7.

206. *Id.* at 904.

207. *Id.* at 904-06.

interpretation.²⁰⁸

In *Davis*, the court viewed the community's desire to have a voice in low-income housing development as a political question, and it advocated the use of the ballot box to make the community's voice heard.²⁰⁹ If a particular article 34 ballot measure did not contain sufficient information in order to gain the support of community members, then the public could vote it down.²¹⁰ The court also suggested that the public should look to its local governing body to make the decisions on low-income housing developments based on the best interests of the community.²¹¹

As a result of this last supreme court decision, the open-end general ballot measure was deemed sufficient for article 34 approval.²¹² A city need only present to the electorate the total number of units to be built within the city boundaries in the future.²¹³ If the city determines that additional units may be needed, it may submit another general ballot measure to the public for approval.²¹⁴

G. Amendment to Government Code Section 65589.5, Relating to Housing, Approved September, 1990.

Although not directly related to article 34, the amendment to Government Code section 65589.5²¹⁵ does address a problem concerning local control of a low-income housing project. The legislature states therein that the lack of affordable housing is a critical problem in California.²¹⁶ The high cost of the state's housing supply is partially due to the activities and policies of the local governments, which limit approval of affordable housing, and require high fees to be paid on low-income housing projects.²¹⁷ As a result, there is discrimination against low-income and minority households, depressing of state and local economies, and deterioration of the quality of life.²¹⁸ The legislature also states that it is the policy of the state that a local government not reject or make infeasible affordable housing

208. *Id.* at 907.

209. *Id.*

210. *Id.*

211. *Id.*

212. *Id.*

213. *See id.*

214. *See id.*

215. CAL. GOV'T CODE § 65589.5 (West Supp. 1993).

216. *Id.* § 65589.5(a)(1).

217. *Id.* § 65589.5(a)(2).

218. *Id.* § 65589.5(a)(3).

developments that contribute to meeting the housing need.²¹⁹ The section lists the acceptable criteria for rejecting a low-income project. Voter approval is not one of the criteria.²²⁰

H. *Department of Housing and Community Development*

The CDHCD views article 34 as a hindrance to the state interest in providing adequate housing to all Californians.²²¹ According to the department's 1987 edition of *Article 34: Legal Issues and Ballot Measures*, article 34 has imposed barriers to the development of low-income housing by requiring a time-consuming election process which has discouraged communities from seeking available federal and state housing assistance.²²² According to a department analyst, the major effect of article 34 is to take money that is allocated for housing, and require that it be spent on a referendum.²²³

The department's pamphlet includes examples of housing which "avoid" an article 34 mandated election,²²⁴ and provides a section on recommendations for an article 34 ballot measure and supporting campaign.²²⁵ It notes that local level realtors have supported the low-

219. *Id.* § 65589.5(b).

220. According to California Government Code § 65589.5(d), criteria for rejecting a low-income housing development project include the following factors: the project is not needed for the jurisdiction to meet its share of the regional housing need, *id.* § 65589.5(d)(1); the project will adversely impact the public health or safety, and there is no feasible method to mitigate the problems, *id.* § 65589.5(d)(2); the projects would increase the concentration of lower income households in a neighborhood that already has a disproportionately high number of lower income households, *id.* § 65589.5(d)(4); the development is proposed on agricultural land, *id.* § 65589.5(d)(5); and the project is inconsistent with the jurisdiction's general plan, *id.* § 65589.5(d)(6).

221. CDHCD 1978, *supra* note 21, at 1.

222. *Id.*

223. Telephone Interview with Margaret E. Bell, Housing and Community Development Representative (Nov. 28, 1990). An article 34 election can be financed with federal community development block grant funds. CDHCD 1978, *supra* note 21, at 21.

224. CDHCD 1978, *supra* note 21, at 12.

225. The pamphlet suggests that "great attention" be given to the language of the ballot measure so that it is presented in its most favorable light. *Id.* at 23. A successful 1975 proposal used in Sacramento is given as an example. *Id.* at 24. In this proposal and media campaign, the supporters emphasized the fact that the housing was to be used by the blind, aged, and handicapped, not just low-income families. *Id.* In this way, the proponents hoped to make the proposal more "appropriate politically." *Id.* The pamphlet also suggests flexible wording in the proposal itself so that different agencies and funding sources can be used, and different types of occupants can benefit. *Id.* The pamphlet outlines a number of aspects of a good campaign. Financial contributions can be solicited from the building industry, labor, and civic organizations that support better housing. *Id.* at 25. Advertising and publicity should stress the overall community benefits including jobs, increased economic activity, revitalization of declining neighborhoods, and the fulfillment of the needs of the less fortunate, such as the elderly, in a manner consistent with their dignity. *Id.* at 26.

income housing campaigns. In fact, the overall pass rate for article 34 referenda is high—eighty-one percent.²²⁶

This support for low-income housing affects only a small portion of the projects built today. According to the California Housing Authority, in 1985, conventional public housing accounted for only twenty-three percent of the total low-income housing under Housing Authority management.²²⁷ Some of the units which fall under this definition are projects for housing senior citizens.²²⁸ Much of the low-income housing developed today is done by private developers or non-profit housing corporations.²²⁹

III. ANALYSIS

There are two distinct interests involved in the article 34 controversy. The first is the interest of the citizens in each community who desire some control over the building of state-sponsored housing.²³⁰ The second is the interest of the state in promoting the building of affordable housing.²³¹ In the forty years since the passage of article 34, these two interests have been viewed as directly opposed to one another. As a result, the state, through both the courts and the legislature, has narrowed the scope of article 34.²³² Article 34 now gives voters relatively little control over low-income housing development.

A. *Local Community Interest*

The original intent behind the adoption of article 34 was the desire of the people to have some control over the low-income housing developments in their communities.²³³ According to the voter pamphlet, the need for community control was based on the drain on economic resources in the community, and the desire to keep the community aesthetically pleasing.²³⁴ When a city exempts a housing

226. *Id.* at 2.

227. STATE OF CALIFORNIA DEPARTMENT OF HOUSING AND COMMUNITY DEVELOPMENT, CALIFORNIA HOUSING AUTHORITIES SUMMARY OF 1984 ACTIVITIES 7 (1989) [hereinafter SUMMARY OF 1984].

228. *Id.* at 10.

229. CDHCD 1978, *supra* note 21, at 12-14.

230. *See supra* part II.A.

231. CAL. HEALTH & SAFETY CODE §§ 34200-506 (West Supp. 1993) (authorizing state agencies to provide housing for persons or families who lack the amount of necessary income to enable them to live in decent, safe and sanitary dwellings).

232. *See supra* part II.D.1-2.

233. *Davis v. City of Berkeley*, 794 P.2d 897, 903 n.5 (Cal. 1990).

234. *Id.*

development from property taxes, or waives fees for services or infrastructure improvements, the city loses money. The citizens of the municipality must then go without other services, or pay additional money in property or utility taxes to supplement the city coffers.

The community members are also concerned with the environment and ambiance of their community.²³⁵ The voters, who approved article 34 in 1950, were concerned with the appearance of low-income housing projects, that were usually unattractive, rectangular rows of apartments with few parks, or other amenities.²³⁶ Although few projects of this type are constructed today, low-income developments continue to be high-density projects.²³⁷ It is important to the community members that they be compatible with the existing neighborhoods.

Because of these concerns, community members continue to desire a voice in land use decisions which result in high-density, low-income housing. The clearest example of this is *Bruce v. City of Alameda*,²³⁸ where the plaintiffs attempted to force the city to submit all low-income projects to the electorate for approval.²³⁹

B. State Interest

There is no doubt that the state has a very important interest, articulated by both the courts and the legislature, in providing adequate housing for all California residents. This is the result of the government's commitment to providing safe and sanitary living conditions to all income levels.²⁴⁰ Decent, affordable housing prevents diseases, decreases crime by making rents more affordable, and provides the economy with healthy workers who can survive on comparatively low wages.²⁴¹

The population of California is increasing, but the available land is not, and therefore the cost of land, and subsequently the cost of housing, continues to rise. In order to keep some of the housing

235. *Id.*

236. *See supra* notes 30-32 and accompanying text.

237. *See* Laura Evenson, *S.F. Is Out to Change Image of Public Housing*, S.F. CHRON., Nov. 4, 1991, at B1. The article discusses the Robert B. Pitts Plaza project constructed by San Francisco Housing Authority. The article's photographs contrast a 1950s-style housing project at Yerba Buena Plaza West, that closed in 1988, and the Pitts Plaza, that had recently opened. *Id.* at B7. The new structure is a large townhouse-style development with small grassy common areas, trees, and park benches. *Id.*

238. *Bruce v. City of Alameda*, 212 Cal. Rptr. 304 (Ct. App. 1985).

239. *See supra* part II.E.

240. *California Hous. Fin. Agency v. Elliot*, 551 P.2d 1193, 1198 (Cal. 1976).

241. *Id.*

affordable to members of the lower economic levels, the government steps in and provides funding and resources for low-income housing development.²⁴² The federal and state governments intercede by providing direct monetary funding and tax credits.²⁴³ The local governments may grant property tax exemptions or fee waivers.²⁴⁴ In addition, local governments may donate land for development or sell it to the low-income housing developer at a reduced cost. The local governments may also give market rate housing developers incentives for including low-income units in their developments.²⁴⁵

These are examples of the numerous ways government is equipped to support affordable housing. In addition, local governments must plan for the services that the inhabitants of the housing will ultimately require. There must be police and fire protection, adequate roads, transportation, water and sewers. As a result of its responsibility for providing both support for low-income housing and the required services, the government is a major participant in the planning and development of projects.

The government views article 34 as a restriction on its ability to provide affordable housing. CDHCD has stated that communities are hesitant to request state and federal funding for low-income housing because they must face the initial election process required for article 34 approval.²⁴⁶ This requires both time and money which

242. See *Mercado El Centro Financing*, SANTA CRUZ SENTINEL, Feb. 16, 1992, at A4. The Mercado El Centro is a small combination market and low-income housing complex which is being built in Santa Cruz by the Community Housing Corporation, a non-profit housing corporation. The financing includes loans and grants from Security Pacific Bank, California Rental Housing Reconstruction Fund, City of Santa Cruz Red Cross Reconstruction Fund, U.S. Department of Health and Human Services, Tides Foundations: Photographer's Relief Fund, Local Initiative Support Corporation, United Way of Santa Cruz County, David and Lucille Packard Foundation, and low-income housing credits. *Id.*

243. See *id.*

244. CDHCD 1978, *supra* note 21, at 11.

245. *Id.* at 14; see also Ron Sonenshine, *A Quick Fix for Housing Crisis*, S.F. CHRON., Mar. 9, 1992, at A18. This article reports an experiment in Petaluma, California with affordable prefabricated homes. These factory-built homes start at \$66,000. The low price is possible because the land was free. The land was deeded to the city by a local developer as a condition of city approval for construction of 2,500 new executive homes in the next few years. *Id.*

One common form of incentive is a density bonus wherein the city or county will allow a developer to build more units per acre in return for low-income units being built either in the same location or a different development. 2 NORMAN WILLIAMS, JR., *AMERICAN LAND PLANNING LAW* § 49.02, at 308 (1987). Local governments also use conditional use permits which are building permits that condition issuance to the developer either on performance of an activity, such as building low-income housing, a child care facility, or recreation area, or the payment of an in-lieu fee. OSBORNE M. REYNOLDS, JR., *LOCAL GOVERNMENT LAW* § 144, at 483-86 (1982).

246. CDHCD 1978, *supra* note 21, at 1.

could be otherwise spent on the housing itself. There also have been direct attacks on article 34. In 1974, the legislature placed a repeal before the voters, and in 1977 it authored a proposition for the modification of article 34.²⁴⁷ In addition, both the courts and the legislature have narrowed the scope of article 34 in order to protect the state interest.

C. *Present Scope of Article 34*

The California courts, by interpreting the words in article 34 within their historical context, have narrowed the article's scope. The exception to this is *Elliot* which, for a short time, broadened the scope of article 34 to include low-income housing projects in which a public entity had significant involvement in the development and maintenance.²⁴⁸ However, article 34 was soon restricted to conventional public housing projects by the legislature in Health and Safety Code section 37000.²⁴⁹

In 1985, conventional public housing projects accounted for only twenty-three percent of the total low-income housing under Housing Authority management.²⁵⁰ This percentage represents the low-income housing that clearly falls under the present parameters of article 34. The CDHCD stated that the need for article 34 authority is limited to conventional public housing, defined as state-owned, tax-exempt rental housing where at least fifty-one percent of the units are occupied by low-income persons, where there is mortgage assistance from the HFA under its existing legal structure, or where there is public involvement as extensive as that of HFA.²⁵¹

Today, much low-income housing is built by private developers and non-profit organizations.²⁵² These projects are not built or managed by the Housing Authority.²⁵³ A non-profit community housing organization will often plan, build, manage, and maintain its own projects, that often do not fall within the article 34 parameters. Therefore, it is very likely that Californians have a voice, through article 34 referenda, over less than twenty-three percent of the total

247. See *supra* part II.C.

248. See *supra* notes 72-92 and accompanying text.

249. See *supra* notes 93-100 and accompanying text.

250. SUMMARY OF 1984, *supra* note 227, at 7.

251. CDHCD 1978, *supra* note 21, at 14.

252. *Mercado El Centro Financing*, *supra* note 242, at A4. "Any big project is going to be a public/private partnership almost by definition." William Fulton, *Building & Bargaining in California*, CAL. LAW., Dec. 1984, at 36, 38 (quoting San Francisco Supervisor Bill Maher).

253. *Mercado El Centro Financing*, *supra* note 242, at A4.

low-income housing in the state.

The voice that is given to citizens of California over the approximately twenty-three percent of low-income housing is limited to the support or rejection of a community's low-income housing goal. The general ballot measure validated in *Davis*²⁵⁴ is a statement of the number of low-income units a community would like to build in the future. So little information is given in the general ballot measure that the projects that do fall under the criteria for a vote are not presented for public scrutiny.²⁵⁵

The *Davis* court in deciding in favor of a general ballot measure declined to support any broadening of article 34. The last *Davis* opinion was unique in that it gave very strong deference to the positions of other branches of government and their support of the general ballot measure. Although the court justified its holding by analyzing the language and historical context of the amendment, the overriding thrust of the case was that there should be a consistency in government unless the plaintiff showed that the fundamental purpose of article 34 was thwarted.²⁵⁶

D. Purpose of Article 34

In order to determine if the purpose of article 34 has been thwarted, it is necessary to determine its goal. The courts have attempted to do this through analysis of the terms in the article itself and the historical background of its adoption. There have been differences of opinion on these subjects, and the courts have used the same words and facts to support differing results.²⁵⁷ In both *Elliot*²⁵⁸

254. *Davis v. City of Berkeley*, 794 P.2d 897 (Cal. 1990).

255. The following is an example of a ballot measure which was used in San Luis Obispo to authorize low-income housing development under article 34: "Shall the Housing Authority be authorized to develop additional low rent housing projects in the City of San Luis Obispo not exceeding 150 additional units?" CDHCD 1980, *supra* note 55, at 49. Other ballot measures specifically mention housing for the handicapped or elderly, such as this one from the City of Santa Monica:

From sources limited to federal and state financial assistance funds, including Community Development Block Grant funds, shall the City of Santa Monica, through its appropriate agencies, develop, finance or rehabilitate, but not own or operate, within the City, housing for rental to low and moderate income persons, no less than fifty percent (50%) of which shall be reserved for persons age sixty (60) and older, not to exceed in total throughout the City, one percent (1%) of the dwelling units in the City.

Id.

256. *Davis*, 794 P.2d at 900.

257. *See supra* part II.F.

258. *California Hous. Fin. Elliot v. Elliot*, 551 P.2d 1193 (Cal. 1976).

and the initial supreme court decision in *Davis*²⁵⁹, the court broadened the scope of article 34. These gains were later nullified by subsequent decisions and codes that defined the same terms and facts in a different manner. On this basis, it is rational to conclude that there is some ambiguity, and the key to interpreting the ambiguous phrases is the intent of the framers of the amendment.

The citizens of Eureka who initially saw the need for this amendment were trying to exert some control over the low-income housing in their community. The preliminary loan application had been filed; thus, there was some general information on the project or projects being considered. Eureka was a small town in 1950, where a substantial percentage of the town was at least acquainted with the issue; information concerning city planning was readily available through word of mouth. It is probable that the citizens knew more about what was being planned than what was actually available in writing.

The courts have argued that the term "project" should be defined as the first stages of planning based on the degree of knowledge the citizens of Eureka had concerning their project.²⁶⁰ In following the court's admonition in this regard, a strong argument can be made that the citizens in Eureka had more knowledge than just the total number of units that would be built at some future date. A reaction so strong that it would propel the people to initiate a lawsuit, and ultimately begin a drive to put a constitutional amendment on the ballot, would have to have been the result of a specific proposal.

Therefore, it seems likely that the intent of the voters was to have a voice in decisions regarding the construction of specific low-income housing in their communities. In the 1950s, the framers could never have imagined that affordable housing would be developed privately, run as a cooperative, or built as mixed-income developments. These issues and all the new developments in housing financing could never have been anticipated by the authors of this amendment.²⁶¹ It was the authors' intention to have some control over low-income housing, whatever that might be. A low-income development can have detrimental aesthetic effects on a community regardless of who constructs it. A municipal government that donates

259. *Davis v. City of Berkeley*, 765 P.2d 46 (Cal. 1988).

260. See *supra* part II.F.

261. See generally Peter J. Auzers, EPHB: A New Housing Finance Technique, J. HOUSING, Nov.-Dec. 1990, at 317 (describing "Essential Purpose Housing Bonds" which combine revenue bonds and tax increment financing as a means to provide financing for low-income housing development).

land or services for a low-income development is depleting the city accounts, despite the fact that the project is a mixed-income cooperative developed by a non-profit housing corporation. Citizens have no control over the development of these types of projects despite the fact that they affect the aesthetics and financial soundness of their community. The courts and the legislature have narrowed the article to such an extent that this voice, which was to exert some control in decisions regarding low-income housing development, is no longer available to the people.

E. *Opposing Interests*

The steady trend toward restricting the scope of article 34, as evidenced by the court decisions, codes, and Attorney General's advisory opinions, is a reflection of the state's desire to keep low-income housing construction squarely within the power of the government. The state has also found that the lack of affordable housing can be attributed to local land use decisions.²⁶² Government Code section 65589.5 restricts the rejection of low-income developments by local governments. Local city councils or boards of supervisors are elected by local citizens. By restricting these officials, the state can further restrict the ability of the local citizens to have a voice in low-income housing development.

The need for affordable housing has increased to crisis proportions as a result of the cost of land and increase in population. The state has the responsibility to provide housing, and it has the funding and programs to promote it. There has been a general decline in the amount of available funding for many government programs in the last forty years, and low-income housing development was not exempt.²⁶³ Therefore, the state has a strong interest in encouraging private developers and non-profit organizations to be involved in project development. By restricting article 34, the state has kept voters from discouraging these new sources of low-income housing.

Apparent in the state's actions to decrease local control over low-income development is the premise that voters do not want low-income projects in their backyards. However, article 34 referenda have an overall pass rate of eighty-one percent.²⁶⁴ This can be attrib-

262. See *supra* part II.G.

263. Evenson, *supra* note 237, at B7. David Gilmore, Executive Director of the San Francisco Housing Authority, predicted that federally financed projects, such as the Pitts project, are a thing of the past. *Id.* Due to federal financing cuts, the construction of new public housing has declined in the past decade from 25,000 to 7,500 units. *Id.*

264. See *supra* note 21, at 2.

uted to the fact that the ballot measure is so general that only people opposed to all low-income housing development vote against it. Conversely, this high rate of passage reflects the fact that most people support the construction of low-income housing in their communities. Despite the fact that there may be disputes over a specific project, as evidenced in cases such as *Davis*, Californians want affordable housing. The state in its desire to promote low-income housing may have almost eliminated local involvement in project development without adequate reason.

F. *Proposal by the California Supreme Court*

The California Supreme Court, in the final *Davis* opinion, viewed the community's desire to have a voice in low-income housing development as a political question, and it advocated the use of the ballot box.²⁶⁵ If a particular article 34 ballot measure does not contain sufficient information to gain the support of community members, then the voters should vote it down. The court also suggested that the public should look to its local governing body to make the decisions on the basis of what is in the best interest of the community.

However, these suggestions do not adequately address the problem of a lack of citizen voice. The general voter is not aware that an article 34 ballot measure could contain additional information, or that the ballot measure is supposed to give the voter a voice in low-income housing development.

The court, in suggesting that voters rely on their local, elected officials, is advocating single issue politics. Certainly if officials consistently make decisions that the community does not like, then the voters can refuse to return those officials to office. This could happen in an extreme case, where a housing project is so controversial that a large percentage of the voters is up in arms. However, by the time the election is held, the controversial project could be well on the way to completion. Therefore, as a method of ensuring a citizen voice in low-income project development, this suggestion fails. In addition, single issue politics does not result in well-balanced local government. Local government officials should be elected on a much broader platform than their stand on low-income housing.

265. *Davis v. City of Berkeley*, 794 P.2d 897 (Cal. 1990).

IV. PROPOSAL

A Proposal for Citizens' Voice on the Local Level

The ballot argument supporting article 34 in 1950 stated that the Public Housing Projects Law "is a vote for strong local self-government."²⁶⁶ It was the intent of the framers of article 34 to give local citizens a voice in low-income housing project development.

At this point, article 34 does not give citizens any real local control over construction of low-income housing in their communities. Californians have continued to demonstrate their support for local citizen control by rejecting first the repeal and then the modification of article 34.²⁶⁷ In suits such as *Davis*, individuals have attempted to use article 34 as a means of obtaining some citizen control over specific projects.²⁶⁸ However, despite the support Californians have demonstrated for local control of low-income housing development, the control has evaded them.

In order to remedy this problem, a local Affordable Housing Board should be elected in a community. The members would be elected from specific districts within the city or county, or from specific neighborhoods. This would make each member able to clearly represent the position of the neighborhood, and would also make the member accountable to the neighborhood community.

The board would not be able to veto all affordable housing in the community. This is in contrast to the Alameda ordinance in *Bruce* where the court found that the citizens' ability to reject all affordable housing was contrary to the public interest.²⁶⁹ The function of the board would not be to reject affordable housing, but rather to guide the planning process. The board would have the power to recommend particular projects, or particular types of projects, or make recommendations as to the allocation of funds between competing organizations. This is particularly important in that much of the federal money that comes into a community does so in the form of block grants.²⁷⁰ These grants are then allocated to specific projects on the local level. Recommendation as to the use of

266. *Id.* at 901 n.5.

267. *See supra* part II.C.

268. *See supra* part II.F.

269. *See supra* part II.E.

270. Federal aid is no longer given as categorical grants which specify the purposes for which they are given. REYNOLDS, *supra* note 245, § 137, at 461. Rather, money is usually given as a block grant to a locality under general revenue-sharing policies. *Id.* A locality applies for its share of funds and then is largely free to spend them according to its priorities. *Id.*; *see also* REYNOLDS, *supra* note 245, § 140, at 472-73.

moneys designated for housing would then be made by the board. For example, the board could decide that rehabilitation of existing structures is a better use of the available funds than new construction, or vice versa.

As a result of Government Code section 65589.5, the board should prepare a plan showing possible sites for housing and recommend densities at those sites. This would have to be done at the very earliest stages of development since section 65589.5 limits the acceptable criteria for rejecting a low-income project.²⁷¹ Therefore, the board would have to be involved in the initial stages of planning prior to the development becoming a "project."

Once a proposal has been made for funding a project, the board would work with the developers in order to assure that the housing fulfills the community's needs and is still compatible with the neighborhood. In addition, the board members would return to their neighborhoods to present the local government's position on a particular development or affordable housing in general. Much of the opposition to affordable housing is based on lack of information.²⁷² The public often does not see that affordable housing is going to be a direct benefit to them and their children. In addition, landowners are concerned that low-income housing may decrease their property values.²⁷³ The board member, then, functions as an educator as well as a neighborhood advocate.

In addition to the direct benefits of providing local citizen input to the process of low-income housing development, and increasing citizen support for projects through education, the Affordable Housing Board would have secondary benefits as well. Although there will be some cost associated with the establishment of the board, the board would ultimately reduce costs associated with project development. Controversial projects are usually subject to delay tactics in the form of lawsuits, objections to environmental reports, and public outcry at mandatory public hearings. Attorney fees and environmental

271. See *supra* part II.G.

272. Telephone Interview with Margaret E. Bell, Housing and Community Development Representative (Nov. 28, 1990).

273. DEPARTMENT OF HOUSING AND COMMUNITY DEVELOPMENT, *THE EFFECTS OF SUBSIDIZED AND AFFORDABLE HOUSING ON PROPERTY VALUES: A SURVEY OF RESEARCH* (1988). The pamphlet summarizes fifteen nationwide studies which address the effects of low-income housing on neighborhoods. *Id.* at i. Fourteen of the fifteen reports agree that the effects of subsidized, special-purpose or manufactured housing on nearby property values were positive or negligible. *Id.* at i. Despite this fact, it has been difficult for planners, developers, and housing advocates to convince the public to accept these projects into their neighborhoods. *Id.* at 1-7.

consulting costs increase dramatically in these situations. Any time delay costs the developer and also threatens the funding process in that federal funding applications must be completed within a certain time frame to be considered. This board would not completely eliminate these problems. However, it can reduce them by providing an effective forum for concerned community members to participate in the planning processes.

Another less obvious benefit gained from the establishment of the board is the decrease in political favoritism that is often shown to one or another competing community housing group. For example, when a block grant is received by a city, the city council allocates funds for different groups and projects. The city's rehabilitation department will compete with a non-profit community housing corporation for the housing development funds allocated by the city council. City councils have been known to make these allocation decisions based on the politics of the housing group, or on the desire of the city council members to see a particular group prosper.²⁷⁴ Since the board will make recommendations concerning the allocation of these resources, the importance of the non-housing considerations will be cut.

Many cities have Housing Advisory Councils which differ considerably from this proposal. An Advisory Council is an appointed group consisting of persons who have an economic interest in housing such as realtors, non-profit housing corporation members, or persons who have political connections to the existing local government. Their function is to advise the local governing body on land use and housing issues. However, they lack the accountability to community members that is the backbone of the proposed Affordable Housing Board.

The local code or charter could be amended, if necessary, to establish this body. A local governing body may advocate this amendment if they want to facilitate community involvement in low-income housing development. On the other hand, in communities where there is conflict between the governing body and community members, the local citizens may choose to amend the charter by initiative. In communities where low-income housing is not a consistently volatile issue, the establishment of the board could be less formal, perhaps on an as-needed basis. The method of formation will vary depending on the needs and problems of a particular community.

274. Interviews with Corrine Farley, Loan Specialist, Department of Rehabilitation for the City of Santa Cruz, in Santa Cruz, Cal. (Oct. 1987).

The Affordable Housing Board would not abolish article 34 referenda. It would, however, return to the people of the local communities the voice in low-income project development that was the goal of article 34.

V. CONCLUSION

The state has an important interest in providing affordable housing for all Californians.²⁷⁵ In 1950, the voters recognized the impact that affordable housing projects had on their communities, and they passed article 34 in order to have a voice in low-income housing development.²⁷⁶

Since that time, the courts and the legislature have confined article 34 to the conventional public housing that was predominantly used in 1950.²⁷⁷ In light of the present low-income housing development in California, the courts and the legislature have in effect narrowed the scope of article 34. As a result, the voters in California have little or no control in the development of affordable housing and its impact on their communities.

This comment presents a proposal for an Affordable Housing Board that could function within the confines of the state's interest in providing low-income housing. At the same time, the board could effectively protect the interests of the neighborhoods and the citizens of the community. The board could return to the local communities the citizens' voice in low-income housing development, that was, after all, the promise of article 34.

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275. See *supra* note 240 and accompanying text.

276. See *supra* part II.A.

277. See *supra* part II.D.